PUBLIC BANK BHD.

v.

WAN LEONG HUP KEE CO.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[ORIGINATING SUMMONS NO. O.S. 24-440-91]
18 MARCH 1992

LAND LAW: *Application for vacant possession - Property purchased vide public auction - Title accordingly transferred upon registration to the plaintiff - Whether damages to be based on capital outlay.*

LAND LAW: *Defendant - Alleges property is rent controlled - Tenancy whether lawful - Whether such contention material - Sections 213(3), 226, 267(2) and 267(3) of the National Land Code 1965.*

This is an application for an order in terms to obtain vacant possession of the said premises. *Inter alia* it was also pointed out that the property had been sold by public auction by a Court order *vide* Ipoh High Court originating summons. The plaintiff had bought the property at the auction held on 19 January 1991 for RM190,001. The title had been accordingly transferred to the plaintiff by registration on 26 February 1991.

The issue before the Court was whether the charge created by the previous owners had expressly disallowed any tenancy.

Held:

[1] Statutorily this situation has been provided for in ss. 213(3), 226, 267(2) and 267(3) of the National Land Code 1965.

[2] Except where it is contained in the instrument of charge itself, the consent of a chargee to the granting of any lease or sub - lease shall be signified by his joining therein as indicated in form 15A or 15B, as the case may be, and his consent to the granting of any tenancy shall be given in writing signed by him or his lawfully authorised agent.

[3] These provisions had also been given judicial sanction by the Supreme Court. It follows that even if the Court accepts that there was in fact a tenancy, it is invalid in the circumstances because of the charge unless of course the chargee had given their consent to this and, not withstanding that consent, it shall not be binding on the purchasers unless, prior to the date of registration of the certificate of sale, the tenancy had become protected by the relevant endorsement on the register document of title.

[Order in terms of the plaintiff's application granted.]

Cases referred to:
Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd. [1991] 1 CLJ (Rep) 174 ***(foll)***
Than Kok Leong v. Low Kim Hai [1983] CLJ (Rep) 907 ***(foll)***

Legislation referred to:
National Land Code 1965, ss. 213(3), 226, 267(2), (3)

For the plaintiff - K.C. Chin; M/s. Yeap & Yeap
For the defendant - S.A. Lingam; M/s. S.A. Lingam

JUDGMENT

Abdul Malek J:

By originating summons filed on the 15 May 1991, the plaintiff had applied for vacant possession within 14 days by the defendant of the premises held under Grant No. 12149 Lot No. 622N, Ipoh known as 63 Jalan Iskandar, Ipoh (hereinafter "the property"), and damages for the period commencing on 1 May 1991 until the date of delivery of vacant possession of the property with damages at 8 per cent per annum on the total of RM190,001. Should the defendant fail to deliver vacant possession, the plaintiff had also prayed for police assistance. Of course, there was the usual prayer for costs.

In her arguments, learned Counsel for the plaintiff had pointed out that the property had been sold by public auction by a Court order dated 30 July 1990 *vide* Ipoh High Court Originating Summons No. 31-291-88. The plaintiff had bought the property at the auction held on 19 January 1991 for RM190,001. The title had been accordingly transferred to the plaintiff by registration on 26 February 1991. By letter dated 22 March 1991, through their solicitors, the plaintiff had given the defendant notice to vacate the property on or by 1 May 1991. It is also not disputed that the charge on the property was created by the previous owners on 21 September 1985. Learned Counsel had reiterated that with the defendant's refusal to vacate, the plaintiff had suffered damages which should be based on the outlay.

The contention raised by learned Counsel for the defendant was that the property was rent controlled and that its sole proprietor had rented the ground floor of the property for RM400 per month with effect from 1 September 1987 and the first floor for RM100 per month with effect from 1 January 1991 from Ban Loong Company of which two of the three associates were the former owners who had charged the property to the plaintiff. On receipt of the letter dated 2 February 1991 from the plaintiff to the occupiers of the property as regards the purchase at the auction, the defendant had remitted the RM500 monthly rentals to the plaintiff. The defendant does not deny that there was no tenancy agreement and had only exhibited the relevant rental receipts to support their contention.

As correctly submitted by learned Counsel for the plaintiff, Clause 16 of the charge created by the previous owners had expressly disallowed any tenancy. The relevant clause reads:

> 16. The chargor (s) will not lease let out or grant any licence or otherwise howsoever part with the possession or make or accept the surrender of any lease whatsoever of or in respect of the said Land or any building fixture structure crops or plants thereon or any part thereof to any person firm or company without the consent in writing of the Bank first had and obtained which consent may be given or refused without assigning any reason therefore either absolutely or on such terms and conditions as the Bank deems fit and the decision of the Bank shall be final and conclusive, AND it is hereby expressly agreed and declared that the provisions of s. 251 of the National Land Code shall not apply to this Charge.

Statutorily, this situation had been provided for in ss. 213(3), 226, 267(2) and 267(3) of the National Land Code 1965 which are reproduced here for case of reference:

> 213(3) Notwithstanding the provisions of subs. (2), no tenancy exempt from registration granted after the commencement of this Act shall be binding on:
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> (a) any person or body to whom the grantor subsequently transfers the reversion expectant thereon, or to whom he subsequently grants any lease, sub - lease, tenancy or charge, or in whose favour any lien over that reversion is subsequently created; or
>
> (b) any person or body claiming through or under such a person or body,

unless, prior to the date on which the dealing referred to in paragraph (a) takes effect, the tenancy has become protected by an endorsement on the register document of title to the land pursuant to Chapter 7 of Part Eighteen.

226(1) Where any alienated land, lease or sub - lease is subject to a charge, the proprietor, lessee or sub - lessee; as the case may be, shall not be capable of granting any lease, sub - lease or tenancy under this Chapter without the consent of the chargee.

(2) Except where it is contained in the instrument of charge itself, the consent of a chargee to the granting of any lease or sub - lease shall be signified by his joining therein as indicated in Form 15A or 15B, as the case may be, and his consent to the granting of any tenancy shall be given in writing, signed by him or his lawfully authorised agent.

267(2) Notwithstanding that it was granted with the consent in writing of the chargee, as required by subsection (1) or s. 226, no tenancy exempt from registration granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless, prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title to the land pursuant to Chapter 7 of Part Eighteen.

(3) The provisions of subsection (2) shall have effect in addition to those of subsection (3) of s. 213, under which, by virtue of the fact that he claims through the chargee, the purchaser will not be bound by any tenancy granted by the chargor before the date of registration of the charge unless it had become protected by endorsement prior to that date.

These provisions had also been given judicial sanction by the Supreme Court in *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 CLJ (Rep) 174 and by the High Court in *Than Kok Leong v. Low Kim Ha*i [1983] CLJ (Rep) 907. It follows that even if the Court accepts that there was in fact a tenancy, it is invalid in the circumstances because of the charge unless of course the chargee had given their consent to this and, notwithstanding that consent, it shall not be binding on the purchaser unless, prior to the date of registration of the certificate of sale, the tenancy had become protected by the relevant endorsement on the register document of title.

In the circumstances, the Court had granted the order in terms of the plaintiff's application for vacant possession. As for damages, the Court felt that to award 8% annum of the auction sale price was not justified in the absence of any evidence from the plaintiff as regards the actual rental the property could have fetched and was more inclined to accept the rental alleged by the defendant as the appropriate and fair amount for assessment of damages. Accordingly, the Court granted damages at RM500 per month from the 1 May 1991, which was the date the defendant was to vacate by the plaintiff's notice to quit, up to 31 January 1992, which was the expiry date of the one month grace period the Court gave the defendant to vacate.

At a subsequent hearing on 22 January 1992, in consequence of the defendant filing a summons in chambers on a certificate of urgency dated 14 January 1991, the Court had refused both the applications for leave to appeal to the Supreme Court and for stay pending the disposal of the said appeal purely because the same issue had already been decided by the Supreme Court. However, both these applications was subsequently granted by the Supreme Court on 28 January 1991 which had resulted in this appeal.

Also found at [1992] 2 CLJ 1070